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Supreme Court of the United States

No. 71-1582

RYLAND S. FELTS,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT

In seeking certiorari, Petitioner is asking this Court to overturn almost 60 years of well-established, unanimous precedent. In addition, he seeks to have this Court re-try facts already thoroughly and maturely considered by the presiding judge and the Court of Appeals. More importantly, the case itself presents no matter of special or far-reaching importance. On the contrary, the question raised is one which cannot have any significance outside of this case, inasmuch as on January 1, 1969, The Pullman Company ceased all operational activity. As of that date, it no longer employed any Pullman conductors, porters or other sleeping car

personnel. The Pullman Company is now concerned solely with winding up its affairs.

II.

QUESTIONS FOR REVIEW

(1) Should the Court reverse almost 60 years of precedent in a case of no special or important significance?

(2) Should the Court reverse the judgment on the evidence made by the Trial Court and concurred in by the Court of Appeals?

III.

STATEMENT OF THE CASE

Proceedings Below

Petitioner (Felts), an employee of The Pullman Company (Pullman) since 1944, brought this action under the Federal Employers' Liability Act (FELA) to recover for injuries allegedly suffered by him while on duty as a Pullman conductor on the tracks of Respondent, Seaboard Coast Line Railroad Company (Seaboard). He alleged that Seaboard had failed to furnish him a safe place to work as required under FELA.

As a Pullman employee, Felts was entitled to seek the benefits provided by Virginia's Workmen's Compensation Law. But he elected to forego those benefits in favor of an action against Seaboard grounded on the contention that he was, at any given time, the employee of the particular railroad on the tracks of which he was performing his duties as a Pullman conductor.

Felts subsequently amended his Complaint to include Pullman as a party defendant. Both defendants, after answering, moved for summary judgment. Thereafter, Pull-

man's motion for summary judgment was granted on the ground that Pullman was not a common carrier within the meaning of FELA. Although Seaboard's motion for summary judgment was ultimately denied, the Court never reached the merits of that motion but instead based its decision on a finding that the technical requirements of Rule 56, Fed R. Civ. P., had not been met.

The matter was tried in the United States District Court, Eastern District of Virginia, Richmond Division, before the Honorable Richard B. Kellam of the Norfolk Division and a jury. After deliberations, the jury returned a general verdict against Seaboard in the amount of $20,000.00.

Seaboard made several post-verdict motions. By way of summary, the issues raised by those motions included the following:

(1) The applicability of FELA to employees of Pullman,

(2) The sufficiency and weight of the evidence on the employment issue,

(3) The adequacy of the Court's charge on the employment issue,

(4) The omission of any reference to federal or state income taxes in the Court's charge on damages,

(5) The Court's exclusion of admissible evidence on the issue of employment, and

(6) The manifestly excessive verdict.

After briefs and oral argument, the Trial Court granted Seaboard's motion for judgment n.o.v.

On Appeal, the Fourth Circuit, in a one-sentence *per curiam* opinion, agreed that Seaboard was entitled to judgment as a matter of law and, alternatively, that the jury

verdict was manifestly against the weight of the evidence and reasonable men could not differ on the fact that Felts was not an employee of Seaboard. The judgment for Seaboard was, accordingly, affirmed.

All page references will be made either to the printed appendix on appeal (App. ....), the Exhibit Volume (Exh. ....), or on a few occasions to the original transcript (Tr. ....). The Exhibit Volume includes the Uniform Service Contract which will be abbreviated "U.S.C.," the Pullman Conductor's Manual which will be abbreviated "P.C.M.," and the Seaboard Conductor's Manual which will be abbreviated "S.C.M."

The Injury

On May 7, 1968, Felts was assigned by Pullman to duty as a Pullman conductor on the Silver Comet. Originating in New York and terminating in Birmingham, this train became a Seaboard train only after it reached Richmond.[1]

After receiving his assignment from Pullman, Felts went to the station in Richmond to board the train. When he arrived, he found that the Pullman porter was unable to open the platform trap door on the sleeping car "Delaware County." This car was owned by the Pennsylvania Railroad (App. 150, 192) and leased to Pullman. (App. 191)[2] Upon

---

[1] There is no evidence found at App. 83-84 that "[n]ormally only one sleeper was used on the Silver Comet with no Pullman conductors" as stated in Felt's Petition at page 3.

[2] Pullman cars were owned by various railroads and leased to Pullman which, in turn and by contract (Exh. U.S.C.), furnished the cars, along with Pullman service, to the railroads. Although the District Court's Memorandum Opinion dated September 3, 1971 states that Pullman owned the car in question, the Court was made aware of the ownership of the car by the Pennsylvania Railroad prior to entry of judgment n.o.v. (See letter dated September 7, 1971, included as Appendix hereto.) In any event, Pullman, not Seaboard, furnished the sleeping car in question.

inquiry, Felts learned from the porter that the door was jammed. Felts did not attempt to open this door himself nor did he make any report regarding the door at that time. Instead, he asked two unidentified Union Station employees to attempt to open the trap door. (App. 109) (There was no evidence that these men were employed by Seaboard.) According to Felts, these two men took a large sledge hammer and succeeded in loosening and opening the door.

Later, on arrival in Petersburg, the Pullman porter discovered that the platform trap door was jammed once again and that he was unable to open it. At this point, Felts knew that the door was jammed, (App. 140), that the porter had been unable to open it and that it had taken considerable force to open it when it had previously jammed in Richmond. Felts also knew that passengers would be boarding in Petersburg, because he possessed a diagram furnished him by the ticket office at Richmond's Union Station. In addition, according to Felts' own testimony, he had been suffering from a painful back problem. (App. 136)

Nevertheless, Felts chose to disregard all this and instead of reporting the jammed door and boarding the passengers through another door or seeking help, he leaned over without bending his knees and attempted to pull up on the door to open it. According to Felts, this act caused his injury. (App. 114)

After returning to Richmond, Felts was referred to a number of doctors by Pullman. (App. 124-127) In general, the medical evidence showed that Felts had suffered no more than a back strain which doctors agreed was not of a permanent nature. (Tr. 60-61, 292) Indeed, the doctors were unable to find objective symptoms long before the trial. (Tr. 49, 307) Several doctors repeatedly recommended to Felts that he return to work. (App. 154-155) Despite this, Felts has never returned to work.

The Employment Issue

Pullman is a long-existing corporation with headquarters in Chicago. Until January 1, 1969, it had been in the business of providing sleeping car service to railroad passengers for a century. The working relationship of Pullman and its employees to the railroad on the tracks of which they operated was, then, of long duration and precisely that which one would expect.

PULLMAN'S OPERATIONS ON THE GROUND

In Richmond Pullman employed seven conductors, including Felts, thirty or thirty-five porters, three car cleaners, two electricians, a clerk-steno, a substitute clerk-steno and an agent-foreman, the supervisor in charge. (App. 182, 202) The Pullman conductors were protected by a collective bargaining agreement. (App. 184) This was a bilateral labor contract between Pullman and its conductors' bargaining agent, a different union division from that which represents the conductors of Seaboard. (App. 60-61)

John J. Duss, a Seaboard witness at the trial, was the Pullman agent-foreman; Marion Creed Bales, whose deposition was read to the Court and jury at the instance of Felts, was the regular Pullman clerk-steno. The non-conflicting testimony of these two witnesses provides a clear picture of Pullman's office and yard operations.

Normally, each train had a regular consist of one or more Pullman cars. Passengers with Pullman tickets would occupy space in these cars. If, however, there were more Pullman passengers than could be accommodated in the regular consist Pullman equipment, Seaboard would notify Duss or Bales of the number of passengers needing sleeping car space. Then, Pullman, not Seaboard, would determine the type of equipment on hand that would fill the need. Duss

or Bales would make the selection from the Pullman sleeping cars on hand. Duss or Bales would then specify the car or cars to be supplied and would assign the Pullman conductor and the porters to that equipment. (App. 84-85, 183) Pullman would outfit the car with linen and supplies. (App. 205)[3]

Duss put it this way:

> "Q. Now, if one of the railroad common carriers wanted to have additional sleeping facilities, how would that be relayed to you?
>
> How would that come in to Pullman Company?
>
> A. About that particular time we were hauling quite a number of draftees or military, we would get those requests over the phone from the Seaboard and they would tell us the number of men that they would have or expect to have, and then *we* would figure on that many beds to provide. *We* would select cars to fill that requirement.
>
> Q. And would you also select crews to fill that requirement?
>
> A. Yes." (App. 183, emphasis added)

And Pullman employee Bales, Felts' witness, testified as follows on this point:

> "Q. When the train arrived in Richmond, who would determine the need for additional Pullman sleepers?
>
> Bales: The Seaboard Coast Line.
>
> Q. How would this information come to you?
>
> Bales: The Seaboard Coast Line would call me. They would request the equipment.

[3] Pullman leased the cars from the various railroads, fully equipped with the original complement of blankets, linens, mattresses and supplies for commissary service. Thereafter, Pullman was solely responsible for maintaining, repairing and replacing this equipment.

Q. What would they specify to you?
You said they would request equipment. What would they say to you?

Bales: They might say that they had 75 men today going to Atlanta. *I* would have to figure out the type of equipment they would require from the layover equipment in the yard to accommodate 75 people.

Q. What else would you do?

Bales: *I* would assign the conductor and the porter to the equipment." (App. 85, emphasis added)

Duss was also responsible for inspecting the sleeping cars in Richmond. He would assign Pullman employees to the task of repairing and maintaining these cars (App. 191), including the repair and maintenance of the car platform doors (App. 192). This was not work that was performed by Seaboard (App. 204) but by Pullman. Once a sleeping car was assigned to a train by Pullman it would be removed by the railroad only if there appeared to be a running defect or if the car otherwise became unsafe to operate. (App. 194, 201) Nonrunning defects, such as the defective platform door involved herein, which were discovered en route were required to be reported by the Pullman conductor to Pullman. (App. 74)

Duss also arranged for and conducted the safety meetings held by Pullman for its employees, frequently having guest lecturers from the railroad on the subject of railroad safety. (App. 189)

Pullman's Operations En Route

The manual entitled "General Instructions" issued by Pullman to its conductors in 1952 (Exh. P.C.M.) is comprehensive in its coverage, instructing Pullman conductors and porters on matters ranging from the control of pets in

Pullman cars to the proper procedure to follow in preparing accommodations for Pullman car passengers. Significantly, this manual defining the duties of Pullman personnel on Pullman cars is published by Pullman and distributed only to Pullman conductors and porters. In fact, B. Carnes, Seaboard conductor, stated unequivocally that he had never seen the book (App. 177-178) and was wholly unfamiliar with its contents. (Carnes was guided by the Seaboard Conductor's Manual [Exh. S.C.M.]).

The Pullman manual spells out the relationship of car service employees to each other and to the train conductor.

> "Car service employes are subject to instructions issued by all Officers of the Company and their representatives who act in a supervisory capacity. While on cars, on trains, in stations and yards, or on other railroad property, they also are subject to instructions of the train conductor and officials of the railroad companies.
>
> "The Pullman conductor has jurisdiction over all car service employes on cars in his charge and is responsible for their performance and for coordination and harmony between all members of the crew.
>
> "The Pullman conductor is required among other things to receive passengers, assign accommodations and make collections therefor, rigidly supervise the service, and enforce observations of regulations of the Company by car service employes under his jurisdiction, especially those concerning the comfort of passengers. . . ." (Exh. P.C.M. 1)

This division of authority and responsibility is shown by the testimony of Felts' witness, Pullman conductor Rieley and by that of Seaboard conductor Carnes.

Rieley on direct examination:

> "A Pullman conductor is a sleeping-car conductor who has ***full charge operationwise of sleeping cars*** on

> any given train; in normal assignment of space and general operation of the cars." (App. 47, emphasis added)

Carnes:

> "Actually, I'm in charge of the train. I'm responsible for the conduct, the safety and keeping the train on time and to lift the—my company's transportation, and, also, I—I'm in charge of my baggagemaster and my flagman and my porter, and I assign their duties, see that they are carried out." (App 162)

Rieley also testified that a Seaboard conductor would only have control over the Pullman cars in "an untowards situation." (App. 48)

Carnes' undisputed testimony was that a Seaboard conductor could not sit down and work in a Pullman car or even open a door to a sleeping car room without the permission of the Pullman conductor or porter (App. 162, 174); that he had no key to the sleeping cars or to the locked compartments in them (App. 164, 179); that he never knew the number of Pullman employees on his train or their names (App. 163); that he never knew when they boarded or got off his train or on which car they were stationed (App. 162-163); that he was ignorant of their working hours and their assignments; that he had no knowledge of Pullman rates or Pullman ticket procedures (App. 163); and that the only reports he received from the Pullman crew were in the case of an emergency. (App. 166)

Both in the Trial Court and in the Court of Appeals, Felts contended that Seaboard controlled the details of his work. Both courts rejected this contention for the truth of the matter is that the control exercised by railroad conductors over Pullman employees on board trains is that kind

of control necessary for maintaining the safety and integrity of the train. A train conductor is, as Carnes with some understandable pride testified, "captain of the ship." (App. 174) A railroad conductor is *ultimately* responsible for all operational matters pertaining to the train. This has always been true.

Felts has never denied that he was an employee of Pullman at the time of the alleged accident and that he had been a Pullman employee at all times since Pullman hired him in 1944. Indeed, Felts' counsel conceded this early in the trial. (App. 38)

It is also clear beyond question from the record that the terms and conditions of Felts' employment were set by Pullman and not by Seaboard or any other railroad. In this regard, it was firmly established that Pullman and not Seaboard hired Felts, (App. 38, 65, 153), trained him, (App. 38), fixed and paid his wages with a Pullman check drawn on a Pullman account with a Chicago bank, (App. 97, 104-105, 153), provided his fringe benefits, (App. 76-77), furnished all of the equipment and clothing used by him in the performance of his duties, (App. 38, 68-75), defined his duties, (App. 64, 66, 67, Exh. P.C.M.), evaluated his work performance, (App. 188), set his work and vacation schedules, (App. 67-68, 75, 77-78, 82, 85, 89, 105, 188), and exercised control over the details of his tasks as a Pullman conductor. (App. 187-188, Exh. P.C.M.) In addition, it is also abundantly clear from the record that while a railroad might ask Pullman not to use certain of its employees on its trains, only Pullman had the power to discharge, lay off or furlough Pullman conductors, including Felts. (App. 78-79, 190-191)

IV.

ARGUMENT

Seaboard Was Entitled To Judgment As A Matter Of Law

The inapplicability of FELA to Pullman employees is well settled. The issue was squarely resolved by this Court in *Robinson* v. *Baltimore & O.R.R.*,[4] a decision that was confirmed by congressional action and has been uniformly followed in subsequent cases. There is no contrary precedent.

In *Robinson*, a Pullman porter brought an action under FELA against the B. & O. Railroad to recover damages for injuries allegedly sustained while performing his duty as a porter-in-charge of a Pullman car attached to a B. & O. train. The Trial Court directed a verdict in favor of the Railroad. The judgment was affirmed first by the Court of Appeals and then by a unanimous opinion of this Court, which held as a matter of law that Pullman employees are not employees of a railroad for purposes of suit under FELA. Writing for the Court, Mr. Justice Hughes stated that Congress had plainly and deliberately excluded Pullman employees from coverage under FELA. The Justice concluded that the absence from FELA of any specific reference to Pullman employees was evidence of an exclusionary intent, since Congress was unquestionably aware that Pullman employees worked on interstate trains. The Court stated:

> "It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among

[4] 237 U.S. 84 (1915).

> those to whom the railroad company was to be liable under the Act."[5]

Contrary to assertions in Petitioner's brief, these remarks make it unmistakably clear that this Court was holding as a matter of law that Congress did not intend to include Pullman employees within the scope of FELA. Pullman employees were intentionally left free to pursue their remedies under the common law or state workmen's compensation schemes.

Subsequent efforts in Congress to amend FELA to embrace various categories of excluded employees, including those of Pullman, confirmed the validity of the Court's reading of congressional intent in *Robinson*. A summary of those efforts is presented in this Court's opinion in *Edwards* v. *Pacific Fruit Express Co.*,[6] a case holding that refrigerator car companies, like Pullman, are not within the scope of FELA. There, Mr. Justice Black, writing for a unanimous Court stated:

> "In 1939 Congress substantially amended the Federal Employers' Liability Act. Because of such decisions as *Wells Fargo* . . . and *Robinson* . . ., one of the proposed amendments would have changed the coverage language of § 1 of the Act to read as follows:
>
> 'Every common carrier by railroad, including every express company, freight forwarding company, and sleeping car company, engaged in commerce . . .'
>
> Obviously, the proposal was designed to nullify this Court's construction of the Act which had excluded employees of sleeping car companies and express companies. In committee the proposal received little support and was even opposed by certain segments of organized labor, and it failed to pass. By refusing to

[5] 237 U.S. at 94.
[6] 390 U.S. 538 (1968).

> broaden the meaning of railroads, Congress declined to extend the coverage of the Act to activities and facilities imminently associated with the business of common carrier by railroad."[7]

Accord, Roby v. *Boston & Maine R.R.,* where the Supreme Court of Massachusetts said:

> "The amendment effective August 11, 1939 [citations omitted], of the Federal Act did not change the law in this respect. It broadened the Act in its application to the carriers' employees; it did not expand the latter category. [citations omitted] The committee report shows that a proposal to broaden the act to include express, freight forwarding and sleeping car companies was expressly rejected."[8]

Congress, in short, though given a clear opportunity to overturn *Robinson,* chose not to do so. Further, the nature of the rejected amendments confirmed the Court's holding that Congress intended to exclude Pullman employees from FELA coverage.

Robinson, similarly, has been consistently followed by all other courts, both state and federal, that have ruled on the applicability of FELA to Pullman employees. The issue arose again less than five months after *Robinson,* this time in a Seventh Circuit case, *Lindsay* v. *Chicago, B. & Q. R.R.*[9] There the widow of a Pullman waiter and cook brought an action for wrongful death under both FELA and the Colorado Wrongful Death Act. The Seventh Circuit, regarding itself bound by *Robinson,* wasted little time

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[7] 390 U.S. at 538, footnotes omitted.

[8] 149 N.E. 2d at 663. *See also* Hearings before subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act 76 Cong., 1st Sess, 57, 58 (1939).

[9] 226 F. 23 (7th Cir. 1915).

in affirming the Trial Court's dismissal of the FELA action.

The question recurred next in 1933 in *Wilson* v. *Nashville, C. & St. L. Ry.*[10] The widow of a Pullman conductor brought a wrongful death action under FELA after her husband fell off the observation platform of a non-Pullman railroad car. On these facts, the Tennessee Court of Appeals, citing *Robinson,* held that a Pullman conductor is not an employee of the railroad for purposes of FELA.

In 1949 the New York Court of Appeals in *Taylor* v. *New York Central Railroad Co.*[11] considered whether a Pullman porter could maintain an action under FELA to recover damages for injuries allegedly sustained when the car in which he was riding derailed and overturned. The porter claimed that for purposes of FELA he was an employee of the New York Central Railroad Company, as well as of Pullman. The Court of Appeals relied on *Robinson* and had little difficulty in concluding, *inter alia,* that Pullman employees are not covered under FELA.

Thirteen years after the *Taylor* case, the unavailability of FELA to Pullman employees was affirmed again, this time by the Supreme Judicial Court of Massachusetts in *Roby* v. *Boston & Maine R.R.*[12] In that case a Pullman porter sued the Boston & Maine Railroad to recover damages for personal injuries received as a result of a collision of railroad cars, relying in part on FELA. Citing *Robinson,* the Railroad moved for directed verdict on the FELA cause of action. After the Trial Court erroneously denied the motion, the Supreme Judicial Court on appeal unanimously held that:

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[10] 65 S.W. 2d 637 (Tenn. 1933).
[11] 294 N.Y. 397, 62 N.E. 2d 777 (1949).
[12] 149 N.E. 2d 661 (1958).

> "It was error not to enter a verdict for the defendant under count 2 [FELA count]. The plaintiff for purposes of the Federal Employers Liabilities Act was an employee of the Pullman Company and not an employee of the defendant. This is established by *Robinson* v. *Baltimore & Ohio Railroad* . . . [citation omitted]."[13]

Finally, as recently as 1963 the issue appeared in *Gloster* v. *Pennsylvania R.R.*[14] A Pullman porter died from injuries received while engaged in an attempt to extinguish a fire on a Pennsylvania Railroad train. His widow sued the Railroad, basing her claim in part on FELA. The Court dismissed this cause of action, relying heavily upon *Robinson.* Although the Court noted that the plaintiff made no averment as to any relationship of employment between the decedent and the Railroad, this was not the basis for the FELA dismissal. Instead, by quoting extensively from the Robinson opinion, the Court in *Gloster* went out of its way to make unmistakably clear that an amendment to include an averment of employment relationship would have been to no avail.[15]

This, then, is a complete summary of the reported cases since *Robinson* that have ruled on the precise question whether a Pullman employee is also an employee of a railroad for purposes of FELA. Every single one of these cases involved substantially similar employment facts as those alleged herein and each has held unequivocally that a Pullman employee is not such a railroad employee. All of these cases rely on the Court's ruling in *Robinson,* a decision never criticized in other reported cases, much less ignored or over-

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[13] 149 N.E. 2d at 662.

[14] 214 F. Supp. 207 (W. D. Pa. 1963).

[15] This reading of the *Gloster* opinion is supported by the Supreme Court of Missouri's characterization of that opinion in *Turpin* v. *Chicago Burlington Ry.,* 403 S.W. 2d 233, 240 (1966).

ruled.[16] Indeed, the fact that the issue has been raised so few times since *Robinson* is an indication that it has long been considered to have been firmly settled once and for all by *Robinson*. By the same token, *Robinson* governs the case at bar.

Baker v. Texas[17] Is Not Relevant

Felts relies heavily on *Baker* v. *Texas*. However, a careful and rigorous analysis of that case reveals that his reliance is misplaced. In *Baker,* the Texas & Pacific R.R. contracted with W. H. Nichols & Co., to repair, strengthen and stabilize the Railroad's track bed. Plaintiff's decedent had been hired by Nichols to work along the track bed and was struck and killed by a train while so engaged. Plaintiff brought an action under FELA, alleging that his decedent was killed while "employed" by the Railroad within the meaning of FELA. The trial judge declined to submit the employment issue to the jury, holding as a matter of law the decedent was not in such a relationship to the Railroad at the time of his death as to entitle him to the protection of FELA. Ultimately, this Court reversed, holding that the Trial Court had erred in refusing to submit the issue of employment to the jury.

Baker, however, is clearly distinguishable from the case at bar because it did not involve the employment relationship, if any, between a Pullman employee and a railroad. As indicated previously, the Court in *Robinson* made it unmistakably clear that the FELA does not cover Pullman employees. Such was the intent of Congress, and, as we have seen, this continues to be the intent of Congress, *Baker* necessarily, therefore, did not overrule *Robinson*. On the

[17] 359 U.S. 227 (1959).

[16] *See* Shepard's United States Citations.

contrary, it cited *Robinson* with approval.[18] *Baker,* unlike *Robinson,* deals with persons who may come under the coverage of FELA if they can establish the requisite employment relationship.

There is yet another distinction between the *Robinson* and *Baker* decisions. The employment relationship dealt with in *Robinson* and present in the instant case is a precise, traditional, well-defined employment relationship, the characteristics of which are easily specified and remain essentially constant. By contrast, the types of employment relationships governed by *Baker* belong to a miscellaneous class of employment relationships with varying characteristics. Unlike the employment relationship in both *Robinson* and the instant case, the miscellaneous class of relationships governed by *Baker,* between a railroad on the one hand, and a contractor and its employees on the other, can vary in an infinite variety of ways thereby frustrating any effort to generalize accurately about this class of relationships. For example, at one extreme the contractor may simply be the alter ego of the railroad created by the latter in an effort to avoid the consequences of FELA.[19] The other extreme would seem to be the case of a wholly independent contractor carrying on its operations entirely independently of the railroad and exercising exclusive control in the relevant sense over its employees. Between these two extremes, one can postulate endless variations.[20] It is no wonder, then, that

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[18] 359 U.S. at 228. *See also Hetman* v. *Fruit Growers Express Co.,* 346 F.2d 947 (3rd Cir. 1965), which explicitly stated that *Baker* made it abundantly clear that the *Robinson* case was still the law of the land.

[19] *See Gaulden* v. *Southern Pacific Railroad Co.,* 78 F. Supp. 652 (N.D. Cal. 1948). Note, however, that the ownership of a contractor by a railroad is irrelevant in the absence of fraud. *See Turpin* v. *Chicago Burlington Ry.,* 403 S.W. 2d 233, 240 (1966).

[20] One of these variations was presented in *Thornton* v. *Norfolk & Western Ry. Co.,* 307 F. Supp. 667 (E.D. Va. 1969) a case decided by the Trial Court herein. There, Judge Kellam quite properly followed *Baker.*

the *Baker* case required an employment relationship issue of this nature to be submitted to the jury.[21]

Significantly, the furnishing of Pullman sleeping car service is neither traditionally nor historically a railroad function. It is traditionally and historically a function of Pullman. On this account, it is not surprising to find that courts have also excluded employees of Railway Express, Inc. from coverage under FELA.[22] Like employment relationships involving Pullman employees, those involving Railway Express employees are also traditional and well-defined with characteristics which are easily specified and essentially constant.

In conclusion, then, *Robinson* and its progeny, together with *Edwards* leave no doubt that the continuing intent of Congress is that Pullman employees are excluded from coverage under FELA. Seaboard, therefore, was entitled to judgment as a matter of law.

Seaboard Was Entitled To A Directed Verdict Or In The Alternative To Judgment Notwithstanding The Verdict

It is settled beyond doubt that in federal cases a verdict should be directed or a judgment entered notwithstanding a verdict whenever reasonable men viewing the evidence in the light most favorable to the party against whom the motion is sought could not reach differing conclusions.[23] It is also settled that parties in federal cases cannot avoid a directed verdict or judgment notwithstanding the verdict simply because there is a scintilla of evidence to support that

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[21] Examples of cases of this sort are cited in Petitioner's brief at page 12.

[22] *See Jones* v. *New York Central R. Co.*, 182 F.2d 326 (6th Cir. 1950). *See* also *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920).

[23] *See Brady* v. *Southern Railroad*, 320 U.S. 476 (1943); *Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio*, 315 F. 2d 467 (4th Cir. 1963).

party's position.[24] Nor is there any doubt that these standards are also applicable to employment relationship issues in FELA cases. Thus, neither the well-known *Rogers* v. *Missouri Pac. R. Co.* case.[25] nor the *Baker* case, discussed above, precluded the entry of judgment notwithstanding the verdict in the instant case.

This point is well illustrated by *Turpin* v. *Chicago, Burlington & Quincy Ry. Co.*,[26] a case very similar to the case at bar. In that case, plaintiff was employed by a truck line which was wholly owned by the railroad and which had contracted with the railroad to load and unload trailers used in "piggy back" operations. Injured in the course of these operations, plaintiff brought an FELA action against the railroad alleging joint employment. At trial, plaintiff presented evidence which tended to show, *inter alia*, that railroad employees inspected the loading for safety and security and often issued orders to plaintiff in this regard. The jury found for plaintiff and the Trial Court entered judgment notwithstanding the verdict on the ground that the evidence was insufficient to establish the fact that plaintiff was an employee of the railroad.

On appeal, plaintiff contended that the *Rogers* and *Baker* cases required the Court to submit the employment issue to the jury. The Supreme Court of Missouri, *en banc*, disagreed.

> "Counsel say that under the FELA decisions, any evidence 'even the slightest,' will make a jury issue. They cite *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500 . . . [citations omitted]. Those cases all involved issues of negligence or proximate cause under the FELA, and it was to the proof on those questions that the remarks

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[24] *See Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio*, 315 F. 2d 467, 469 (4th Cir. 1963).

[25] 352 U.S. 500 (1957).

[26] 403 S.W. 2d 233 (1966).

relied upon by plaintiff were directed. On the other hand, it seems clear that the burden of proving *employment* by the defendant in FELA cases is on the plaintiff, that this question is to be determined under general law (general federal law, if there be any difference), and that the terms 'employer' and 'employee' are used in the act in their usual and natural sense." [citations omitted]

"Plaintiff relies rather strongly on Baker . . . as to the sufficiency of the evidence, but Baker does not either by its own language or by subsequent constructions, hold that any evidence which may possibly tend to show employment forecloses a directed verdict or a summary judgment." 403 S.W. 2d at 237-38. (emphasis in the original)

Thus, the Court clearly established that the standards governing directed verdicts and the entry of judgment notwithstanding the verdict in FELA cases are the same as those which govern in federal cases generally. From this, the Court went on to affirm the Trial Court's entry of judgment for the railroad, holding that the railroad's ownership of the truck line was irrelevant in the absence of fraud and that reasonable men could not differ in concluding that plaintiff was not an employee of the railroad even though plaintiff had presented some evidence on this point.

Given this standard, judgment notwithstanding the verdict was appropriate in the instant case. Reasonable men viewing the evidence in the light most favorable to Felts could not differ in concluding that Felts was not an employee of Seaboard under FELA.

The Relationship Between Felts And Pullman Epitomized The Usual And Natural Employment Relationship

Felts has conceded that only Pullman had the power to hire, discharge, furlough, train and transfer him. (App.

38, 77-78, 189-191) He also concedes that only Pullman provided him with vacations and scheduled them. (App. 105, 188) Pullman also paid Felts' wages, established his work schedules and assignments and provided all of his fringe benefits. (App. 67-68, 76-77, 82, 85, 89, 104-105, 153) Further, despite Felts' reluctance to admit it, the record unequivocally establishes that Pullman provided him with *all* equipment such as uniforms, rate books, call cards and fare books. (App. 38, 68-76)

Pullman Alone Had Control Over The Details Of Felts' Work

Power to control is undoubtedly relevant in considering whether Felts was a Seaboard employee. However, it is important to have clearly in mind the kind of control that is relevant. To be sure, the railroad conductor is the "captain of the ship," responsible for the safe operation of the train. As such and to this extent, he has jurisdiction over every person on the train. But this is not the kind of control which is relevant in determining whether Felts was an employee of Seaboard under FELA. Instead, the cases clearly establish that the crucial factor is not the existence of power to control incident to safety and operational exigencies, but rather, whether there is control over the manner in which the details of the particular task are to be executed.[27] The Supreme Court of Missouri put this point well in the *Turpin* case.

> "Generally, the reservation of the right to control the details of the work, as distinguished from its result, is the material factor. *Chicago, Rock Island & Pacific Railway Co.* v. *Bond*, 240 U.S. 449, 36 S.Ct. 403, 60 L.Ed. 735. We note in passing: that 'occasional direc-

[27] *See Cimorelli* v. *New York Central Railroad*, 148 F. 2d 575 (6th Cir. 1945).

tions' given by a railroad crew to the employees of a carloading company working on railroad premises are not controlling (*Latsko* v. *National Carloading Co.*, 192 F.2d 905); that express messengers, working regularly on trains in cars furnished by the railroad, are not its employees (*Jones* v. *New York Central Railroad*, 182 F.2d 326; *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205) nor is there a joint employment; that an employee of Missouri Pacific Truck Lines, crushed between two highway trailers being loaded on a flatcar of the Missouri Pacific Railroad, was not an employee of the railroad, when hired and paid by the wholly owned subsidiary, and that he was not doing railroad work (*Fawcett* v. *Missouri P.R.R. Co.*, 242 F.Supp. 675, aff. CA 5, 347 F.2d 233); that a general control over all transportation functions does not suffice to make an employee of the Pullman Company an employee (also) of the railroad (*Gloster* v. *Pennsylvania R.R.*, 214 F. Supp. 207)." 403 S.W.2d 233, 240.

Accord, Robinson v. *Baltimore & O. R.R.*, where Mr. Justice Hughes also made this point.

> "The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation."

Similarly, the control considered relevant by this Court in the *Baker* case was the railroad supervisor's:

> ". . . directive control *over the details of the job* performed by the individual workmen, including the pre-

> cise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture." 359 U.S. at 228, 229. (emphasis added)

No such control was exercised by Seaboard or any other railroad over the details of Felts' work. On the contrary, the record discloses that Pullman and not Seaboard exercised control over the details of Felts' work. Thus, Felts himself admitted that he had complete "jurisdiction over the service of the Pullman cars." (App. 146) Former Pullman conductor Rieley also admitted on direct examination that a Pullman conductor had "full charge operationwise of sleeping cars on any given train; in the normal assignment of space and the general operation of the cars." (App. 47) In the same vein Rieley read the following paragraph from the Pullman "General Instructions" (Exh. P.C.M.) and admitted that the paragraph was valid for normal operations:

> "The Pullman conductor has jurisdiction over all car service employees on cars in his charge and is responsible for their performance and for coordination and harmony between all members of the crew." (App. 64)

In fact, a thorough review of the Pullman "General Instructions" (Exh. P.C.M.) makes abundantly clear the comprehensive nature of the control exercised by Pullman over every detail of Felts' work.

Nor is the conclusion contradicted in the slightest by the selective examples cited by Felts in his brief. Every example treated by Felts concerned the control necessary for operational safety, not supervision over the details of Felts' work, Thus, Felts cannot rely on the train's conductor's power to remove unruly persons from the train, his power to resolve disputes that cannot be settled by the

Pullman conductor and his power to waken a sleeping Pullman conductor who is supposed to be awake and supervising his cars. All these powers are totally consistent with a train conductor's traditional responsibility for the safety of his train and its passengers. These powers do not reflect control over the details of Felts' work as a Pullman conductor.

In sum, then, the cases clearly establish that the type of control relevant in considering whether Felts was an employee of Seaboard under FELA is not the railroad's authority over everyone on board as to matters of operational safety, but, rather, the control over the details of Felts' work. As Felts' own evidence reveals, the details of his work were controlled by Pullman and not by Seaboard.

Recently, in a case very similar to the instant case, a District Court in the Eastern District of Pennsylvania granted a directed verdict in an FELA action on the ground that plaintiff's evidence showed that plaintiff was solely an employee of a freight handler and forwarder and not a joint employee of the latter and a railroad. The Third Circuit affirmed this decision and in the course of its opinion used language which aptly describes the case at bar.

> "The usual tests evidencing appellant's bona fide employment by Northern are all present. Northern selected him, hired him, paid him, could discharge him and directed and controlled his work. . . . The cooperation and assistance furnished by the railroad helped enormously in the successful accomplishment of Northern's task but it was Northern who controlled the way it performed its job."[28]

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[28] *Tarboro* v. *Reading Company*, 396 F. 2d 941 (1968) quoting from *Del Vecchio* v. *Pennsylvania Railroad Company*, 233 F. 2d (3rd Cir. 1956), cert. den. 352 U.S. 909.

A directed verdict was unquestionably proper in these cases. A judgment n.o.v. was unquestionably proper in the case at bar.

V.

CONCLUSION

Like the plaintiff in *Robinson,* this Petitioner was an employee of Pullman. As such, they were both required to obey all rules and regulations of the railroad over the lines of which the cars of Pullman were operating. (237 U.S. 84, 89-90, fn. 1, para. Sixth) At best, Felts showed only that he was subject to the railroad's operating rules and regulations while engaged in his work for Pullman. This was basically the argument made in *Robinson* and this Court put it to rest with this language:

> "The service provided by The Pullman Company, was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employees of The Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation." (237 U.S. 84, 93)

The Court followed up with this:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employe." (237 U.S. 84, 94)

Felts has cited no case impairing the continued validity of *Robinson* and he has cited no case holding that a Pullman employee such as he can forego his rights against his

employer and receive, through judicial action, a windfall from a railroad having no employment connection with him. Every reported case since 1915 has resolved this exact issue in the manner urged herein. This, along with the conclusions drawn from the evidence by the Trial Court and the cessation of operations by Pullman render this an inappropriate case in which to grant certiorari.

Respectfully submitted,

SEABOARD COAST LINE RAILROAD COMPANY

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CERTIFICATE OF SERVICE

I certify that I have had mailed three copies of the foregoing brief to Willard J. Moody, Esquire, Moody, McMurran and Miller, 200 Professional Building, Portsmouth, Virginia 23704, counsel for Petitioner, this 28th day of June, 1972.

EPPA HUNTON, IV

APPENDIX

September 7, 1971

230-618-33

Ryland S. Felts v. Seaboard Coast Line Railroad Company —In the United States District Court for the Eastern District of Virginia, Richmond Division—Civil Action No. 384-69-R

The Honorable Richard B. Kellam
United States District Judge
United States District Court
Eastern District of Virginia
Norfolk Division
Norfolk, Virginia 23510

Dear Judge Kellam:

We received the memorandum opinion in this case today and we were, of course, pleased with the Court's decision. However, although we do not think that it is at all significant in the opinion, we felt that we should, nevertheless, point out to the Court one error in its factual recitation: On page 10 the Court wrote that "Pullman owns the cars." The evidence was that the railroad cars were owned by various railroads, the car in question being owned not by Seaboard but by the Pennsylvania Railroad.

We will promptly tender the appropriate order to counsel for the Plaintiff.

Respectfully,

/s/ R. Kenneth Wheeler
R. Kenneth Wheeler

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cc: Mr. W. Farley Powers, Jr., Clerk
Raymond H. Strople, Esquire